Supreme Court, U.S.
FILED
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(2)

No. 90-1692

In the Supreme Court of the United States

OCTOBER TERM, 1991

DANIEL GLECIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment was sufficient to allege a RICO conspiracy.

2. Whether the district court abused its discretion by denying petitioner's motion for a bill of particulars.

3. Whether the RICO statute is unconstitutionally vague as applied to the facts of this case.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1–14, is reported at 923 F.2d 496.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1991. A petition for rehearing was denied on February 1, 1991. Pet. App. 16. The petition for a writ of certiorari was filed on May 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of conspiring to conduct and to participate in the affairs of an illegal enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d).

1. The evidence at trial, the sufficiency of which is not in dispute, is described in the government's brief in the court of appeals. In 1977, petitioner was an attorney in private practice in Illinois. His practice included regular appearances before the Fifth Municipal District, a division of the Circuit Court of Cook County, and frequent representation of defendants charged with drunk driving. While in private practice, petitioner paid cash bribes to two state prosecutors, Cary N. Polikoff and James J. Costello, and to circuit court judges in return for favorable dispositions of cases. Gov't C.A. Br. 5–9.

Polikoff first accepted bribes from Alan Masters, another lawyer who practiced in the Fifth Municipal District. Masters introduced Polikoff to several other lawyers, including petitioner, Michael Ettinger, Richard Pezzopane, and William Kampenga, who also began paying bribes. Costello first accepted a payment from petitioner following a favorable disposition of one of petitioner's cases. Shortly afterward, several other lawyers, including Masters, Pezzopane, and Joseph McDermott, also began making payments to Costello. Petitioner and the other lawyers also paid cash bribes to police officers to induce them to alter their testimony. In addition, petitioner and McDermott referred cases to one another and paid cash bribes to circuit court judges to obtain favorable treatment for their clients in traffic violation cases. Petitioner and the other lawyers often discussed among themselves which prosecutors and judges were amenable to taking bribes. Gov't C.A. Br. 5–9, 14.

In 1979, petitioner became a circuit court associate judge. He was eventually assigned to the Fifth

Municipal District. By that time, Polikoff and Costello, the two state prosecutors whom petitioner had bribed, were in private practice. As a judge, petitioner accepted cash bribes from Polikoff in exchange for favorable dispositions of Polikoff's cases; he also accepted bribes for "steering" cases of unrepresented defendants to Polikoff and for allowing Polikoff to solicit clients in petitioner's courtroom. Costello similarly paid cash bribes to petitioner in return for favorable dispositions of two cases in 1983. Gov't C.A. Br. 9–13.

2. Count 1 of the indictment charged petitioner and seven co-defendants with participating in a RICO conspiracy. The indictment described the illegal enterprise as the Circuit Court of Cook County. After identifying petitioner and the other co-conspirators and reproducing the Illinois statutes prohibiting bribery and official misconduct, the indictment charged that petitioner and his seven co-defendants agreed "to conduct and participate in the conduct of the affairs of the Circuit Court of Cook County, directly and indirectly, through a pattern of racketeering activity, as that term is defined in [18 U.S.C. 1961], said racketeering activity consisting of multiple acts involving bribery under [Ill. Rev. Stat. ch. 38, §§ 33–1 & 33–3]." Pet. App. 3. The indictment further alleged that petitioner participated in the scheme before he became a judge, and it identified him as one of the lawyers from whom state prosecutors Polikoff, Costello, and John Brady accepted bribes. *Id.* at 3–4. The indictment also identified petitioner as one of the Fifth Municipal District judges who "did at various times unlawfully accept cash bribes from or on behalf of attorneys, including [six of the co-defendants] and others known and unknown to the Grand Jury, pursuant to an understanding that they would be influenced in, and knowing that the cash bribes were tendered with the intention of influencing

them in, the performance of acts related to their employment and function as judges." *Id.* at 4.

3. Before trial, petitioner moved to dismiss the indictment. He argued that the indictment's failure to specify the individual predicate acts of bribery by listing the specific bribes by date and case name violated the Fifth and Sixth Amendments to the Constitution and Federal Rule of Criminal Procedure 7(c)(1). The district court ruled that the indictment was sufficiently specific and informative, and denied the motion. Pet. App. 4–5.

Petitioner later moved for a bill of particulars on the ground that the indictment's lack of specificity created a danger of unfair surprise and prevented him from adequately preparing his defense. The district court concluded that a bill of particulars was not required because the government's post-indictment disclosures during discovery provided petitioner with sufficient information concerning the charges. The court suggested that petitioner's motion was intended only to elicit the evidentiary details of the government's case. Pet. App. 9; Gov't C.A. Br. 24.

4. The court of appeals affirmed. Pet. App. 1–14. First, the court rejected petitioner's challenge to the legal sufficiency of the indictment. *Id.* at 2–9. The court noted that a defendant is entitled to an indictment that "[1] states all of the elements of the offense charged, [2] informs him of the nature of the charge so that a defense can be prepared, and [3] enables the defendant to evaluate any possible double jeopardy problems presented by the charge." *Id.* at 5 (quoting *United States* v. *Neapolitan*, 791 F.2d 489, 500–501 (7th Cir.), cert. denied, 479 U.S. 939 (1986)). After examining the RICO conspiracy charge in detail, the court found that the indictment properly alleged the essential elements of the offense. Since "Section 1962(d), like all conspiracy provisions, has as its target the act of agreement," the

court explained, "an indictment need only charge—after identifying a proper enterprise and the defendant's association with that enterprise—that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here the 'pattern' being multiple acts of bribery prohibited by specified provisions of the Illinois criminal code)." Pet. App. 6. "By specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be committed and the *modus operandi* of the conspiracy," the court found that "the indictment adequately enabled [petitioner] to prepare a defense." *Id.* at 6–7. "Similarly," the court noted, "the specific limiting information contained in [the conspiracy count] is sufficient to bar any subsequent prosecution for RICO conspiracy during the same time period and involving the same co-conspirators, enterprise and racketeering activities." *Id.* at 7. The court concluded that "these notice and double jeopardy factors do not require the recitation of specific case names, dates, times and places of alleged bribes." *Ibid.*

Second, the court of appeals rejected petitioner's claim that the district court abused its discretion by denying his motion for a bill of particulars. Pet. App. 9–11. In addition to the indictment, the court pointed out, petitioner "had the information that the government made available through discovery, which included voluminous public records and potential *Brady* material * * *, all tape recordings of the defendants, and all material covered by the Jencks Act, 18 U.S.C. § 3500." *Id.* at 10–11. The court noted that "[t]he government also gave notice to any interested defendant of the names of all co-conspirators not identified in the indictment, as well as the names of cooperating co-conspirators it intended to

call at trial, one of whom was made available to [petitioner's] counsel for pre-trial interview." *Id.* at 11. The court further noted that "the individuals, locations, methods, and case details relating to the *specific* bribes involving [petitioner] * * * were in fact listed in the government's *Santiago* proffer [identifying the co-conspirator statements to be offered at trial], which [petitioner's] counsel received well before any of these witnesses testified or this evidence was introduced." *Ibid.*[1] The court concluded that "the district court's refusal to order the government to [reveal the names and dates of the state court cases in a bill of particulars] was not a clear abuse of discretion in light of the extensive pre-trial disclosure that did take place." *Ibid.*

Third, the court rejected petitioner's challenge to the constitutionality of the RICO statute. The court "join[ed] the First and Third Circuits in re-affirming that the RICO statute is not unconstitutional despite Justice Scalia's statements" in his concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–256 (1989). Pet. App. 2 n.1 (citing *United States* v. *Pungitore*, 910 F.2d 1084, 1102–1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991), and *United States* v. *Angiulo*, 897 F.2d 1169, 1178–1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990)).

ARGUMENT

1. Petitioner contends that the RICO conspiracy charge in the indictment was legally insufficient under the Fifth and Sixth Amendments because it failed to describe in detail the "multiple acts involv-

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[1] The court noted that "the fact that [petitioner's] counsel referred to the subject state cases by name during his opening argument indicates that [petitioner] was in fact apprised of these cases before trial." Pet. App. 11.

ing bribery" that were alleged to constitute the "pattern of racketeering activity." Pet. 5–14.

a. It is well settled "that 'an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)); see *Russell* v. *United States*, 369 U.S. 749, 763–764 (1962); *United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932).

Petitioner does not dispute that the indictment adequately described the elements of the offense. He argues instead that the indictment failed to inform him of the charges against which he was required to defend because it failed to describe the predicate acts of bribery with sufficient specificity. Pet. 7–8. As the court of appeals explained, however, the RICO conspiracy charge, read as a whole, adequately enabled petitioner to prepare a defense because it "specif[ied] the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be committed and the *modus operandi* of the conspiracy." Pet. App. 6–7.

Petitioner's insistence that the indictment set forth the specific "facts, circumstances, dates, locations, parties present, case names or bribe amounts" with respect to each bribe, Pet. 8, misperceives the degree of specificity required of a RICO conspiracy indictment. Every indictment reflects a balance between specificity and conciseness, between reciting evidence and making allegations. It has long been established that an indictment should be "a plain, concise and definite written

statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c); see also *Russell* v. *United States*, 369 U.S. at 762–763. It is not the function of an indictment to set forth the evidence; a more thorough preview of the evidence is properly provided, if at all, through a bill of particulars. See *United States* v. *Debrow*, 346 U.S. at 378; *Stokes* v. *United States*, 157 U.S. 187, 191 (1895); *United States* v. *Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986); *United States* v. *Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983). In this case, the allegations against petitioner specified that the "pattern of racketeering activity" consisted of "multiple acts involving bribery"; it was not necessary for the indictment to go further and include a recitation of the circumstances surrounding each of the separate acts of bribery. Pet. App. 3; see *United States* v. *Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982).

Petitioner asserts that the indictment was defective because it provided an insufficient double jeopardy bar against future prosecutions for the same offense. Pet. 8–9. But as the court of appeals explained, "the specific, limiting information contained in [the indictment] is sufficient to bar any subsequent prosecution for RICO conspiracy during the same time period and involving the same co-conspirators, enterprise and racketeering activities." Pet. App. 7. Moreover, petitioner is entitled to rely on parts of the record other than the indictment to raise a double jeopardy claim in the event future proceedings are initiated against him. See *Russell* v. *United States*, 369 U.S. at 764; *United States ex rel. Ballard* v. *Bengston*, 702 F.2d 656, 660 (7th Cir. 1983) ("An indictment need not plead offenses in such detail as to be self-sufficient as a bar against further prosecution for the same offense; it is the judgment that constitutes the bar.").

b. Petitioner relies on *Russell* v. *United States*, *supra*, and *Stirone* v. *United States*, 361 U.S. 212 (1960), for the proposition that the indictment allowed him to be convicted on the basis of facts not found by or presented to the grand jury. Pet. 9. Unlike the indictment in *Russell*, however, the indictment here did not "simply repeat the language of the criminal statute" or omit an allegation going to "the very core of criminality." 369 U.S. at 764. Nor does petitioner's conviction rest, as in *Stirone*, on a charge that was not contained in or was different from the allegations of the indictment. 361 U.S. at 215–219. To the contrary, the evidentiary proof in this case was simply a more refined version of the factual allegations made in the indictment. See *United States* v. *Miller*, 471 U.S. 130 (1985).

c. Contrary to petitioner's contention, Pet. 10–11, the court of appeals' decision is consistent with *United States* v. *Phillips*, 874 F.2d 123 (3d Cir. 1989). The RICO conspiracy count in *Phillips* charged two attorneys with conspiring to conduct the affairs of a local court through a pattern of racketeering activity. Like the indictment in this case, the RICO conspiracy count in *Phillips* did not allege specific individual acts of racketeering; it simply stated that the defendants conspired to commit "multiple" acts of bribery and extortion in violation of state law. 874 F.2d at 125. In response to the defendants' claim that the evidence at trial was insufficient to sustain their convictions, the Third Circuit noted that "[w]e were initially troubled by the sufficiency of [the RICO conspiracy count] of the indictment because of its failure to specify, with particularity, which acts of bribery and extortion appellants allegedly agreed to commit." *Id.* at 127 n.4. The court went on

to conclude, however, that the RICO conspiracy count was legally sufficient. *Id.* at 127–128 nn.4 & 5.[2]

The court of appeals' decision is also consistent with *United States* v. *Angiulo*, 847 F.2d 956 (1st Cir. 1988). In *Angiulo*, the First Circuit held that the commission of overt acts is not required for a RICO conspiracy conviction. 847 F.2d at 964. In so holding, the court found that an overt act requirement would be superfluous "because, in any RICO conspiracy indictment the government must allege agreement to commit or the commission of *specified* predicate crimes or, alternatively the collection of unlawful debts." *Ibid.* The court reasoned that the specificity must be "sufficient to alert defendants to the nature of the conspiracy for which they are being charged." *Ibid.* Consistent with that reasoning, the indictment here alleged an agreement to commit specified predicate crimes: bribery in violation of state law. Nothing in *Angiulo* suggests that the predicate racketeering acts must be described in detail in the indictment, rather than generally identified as was done in this case.

d. Petitioner claims that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939 (1986). Pet. 11–14. The court carefully reviewed *Neapolitan*, however, Pet. App. 7–9, and concluded that it "most certainly does not stand for the proposition that RICO conspiracy in-

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[2] Later, in addressing the defendants' claim that the jury instructions were erroneous, the *Phillips* court noted that "the Seventh Circuit [in *United States* v. *Neapolitan*, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939 (1986),] required that the predicate acts underlying the RICO conspiracy charge be specified, rather than generally identified as here." 874 F.2d at 130 n.7. The Third Circuit in *Phillips*, however, did not adopt such a requirement. As discussed below, the court of appeals in this case made clear that its decision in *Neapolitan* imposes no such requirement.

dictments must list specific predicate acts in which the defendant was involved," *id.* at 8. In any event, even if the decision in this case conflicted with the Seventh Circuit's earlier decision in *Neapolitan*, the conflict would not warrant review by this Court. Intracircuit conflicts are to be resolved by the court of appeals and do not ordinarily require this Court's intervention. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioner contends that the district court erred in denying his motion for a bill of particulars. Pet. 14–17. The decision whether to require a bill of particulars, however, rests in the discretion of the district court. *Wong Tai* v. *United States*, 273 U.S. 77, 82 (1927). As the court of appeals correctly concluded, the district court did not abuse its discretion by refusing to supplement the government's extensive pretrial discovery with a bill of particulars disclosing the names and dates of the bribes in which petitioner was involved. Pet. App. 9–11.

Petitioner is incorrect when he claims that the pretrial discovery in this case was not an adequate substitute for a bill of particulars. The principal witnesses at trial whose testimony related directly to petitioner were Costello, Polikoff, Kampenga, and McDermott. Although petitioner complains that the proffers identifying the co-conspirator statements to be offered through those witnesses were made only five days before the beginning of the trial, Pet. 16, the proffers were made nearly two weeks before McDermott testified and more than two weeks before Costello and Polikoff testified. Moreover, petitioner's trial counsel interviewed Kampenga three weeks prior to Kampenga's testimony. Gov't C.A. Br. 27–29. In addition, as the court of appeals noted, the government turned over pertinent public records, potentially exculpatory material, and all Jencks Act statements prior to trial. Pet. App. 11.

Petitioner also complains that the court of appeals incorrectly stated that the government turned over "tape recordings of the defendants" when there were no such tape recordings of petitioner. Pet. 16–17. The court's statement refers to the fact that the government turned over all tape recordings involving co-conspirators and cooperating witnesses. Gov't C.A. Br. 27. Petitioner does not dispute that during pretrial discovery he received all the tape recordings that were introduced into evidence at trial.

There is no merit to petitioner's claim that the court of appeals' decision conflicts with *United States* v. *Davidoff*, 845 F.2d 1151 (2d Cir. 1988). Pet. 14–16. In *Davidoff*, the RICO conspiracy count alleged that the defendant conspired to commit extortion offenses including, but not limited to, four substantive extortion counts in the indictment that involved a particular air freight company. At trial, as part of its proof of the RICO enterprise element, the government presented evidence of extortions directed against three entirely different air freight companies not identified in the indictment. 845 F.2d at 1153.

The Second Circuit in *Davidoff* held that "the trial judge exceeded his discretion * * * by denying a bill of particulars identifying at least the victims of discrete extortionate schemes that the prosecution intended to prove." 845 F.2d at 1154. The court found it "simply unrealistic to think that a defendant preparing to meet charges of extorting funds from one company had a fair opportunity to defend against allegations of extortions against unrelated companies." *Ibid.* The court concluded that neither the Jencks Act statements of prosecution witnesses turned over during jury selection and trial nor the 6,000 pages of material concerning wiretap applications and transcripts of wiretapped conversations provided "an adequate substitute for a straightfor-

ward identification in a bill of particulars of the identity of victims of offenses that the prosecution intends to prove." *Id.* at 1155.

The court of appeals' decision in this case is consistent with the Second Circuit's decision in *Davidoff*. The court in *Davidoff* expressly cautioned that it "[did] not mean to imply that even in a RICO case the prosecution must always disclose in advance of trial every act it will prove that may violate some criminal statute." 845 F.2d at 1154; see also *United States* v. *Kaplan*, 886 F.2d 536, 543–544 (2d Cir. 1989). Here, the indictment described the bribery scheme and identified the time period, the locations and courts, and the principal actors and their roles. The government's proof at trial did not go beyond those allegations. In addition, the government's pretrial disclosures revealed "the individuals, locations, methods, and case details relating to the *specific* bribes involving [petitioner]." Pet. App. A11; *id.* at A11 n.5 ("The extent of pre-trial discovery is the primary factor that distinguishes this case from *United States* v. *Davidoff*.").

3. Finally, petitioner contends that the RICO statute is unconstitutionally vague. Pet. 17–20. He primarily relies, Pet. 18, on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–256 (1989), in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern of racketeering activity" requirement could withstand a constitutional vagueness challenge. The court of appeals here correctly rejected petitioner's vagueness challenge to RICO, and its holding is consistent with the holding of every other court of appeals that has considered that contention in the wake of *H.J. Inc.* See *United States* v. *Coiro*, 922 F.2d 1008, 1016–1017 (2d Cir.), cert. denied, No. 90-1521 (June 17, 1991); *United States* v. *Woods*, 915 F.2d 854, 862–864 (3d Cir. 1990), cert. denied, 111 S. Ct. 1413 (1991); *United States* v.

Pungitore, 910 F.2d 1084, 1102–1105 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1178–1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990).[3]

In any event, absent First Amendment considerations, a defendant must show that the statute is vague as applied to the particular conduct with which the defendant is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Whatever ambiguity there may be at the margins of the RICO statute, petitioner's participation—both as a lawyer and later as a judge—in an ongoing bribery scheme to fix cases in the local court over a period of several years unmistakably fell within the

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[3] Before *H.J. Inc.*, as well, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d 38, 41–42 (6th Cir.) (reference to state law in predicate acts did not render statute vague), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.) (collecting cases), cert. denied, 453 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 305 (7th Cir. 1979) (enterprise element), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO conspiracy), cert. denied, 441 U.S. 933 (1979); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

scope of the RICO statute. Cf. *United States* v. *Woods*, 915 F.2d at 862–864. Petitioner's attack on the constitutionality of the RICO statute is therefore without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

U.S. GOVERNMENT PRINTING OFFICE 1991 - 282 061/20622